



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 5, 2003

Ms. Ruth H. Soucy  
Deputy General Counsel  
Comptroller of Public Accounts  
P. O. Box 13528  
Austin, Texas 78711-3528

OR2003-6248

Dear Ms. Soucy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 187155.

The Comptroller of Public Accounts (the "comptroller") received a request for the "audit files and the collections files maintained on [a specified] matter." You state that the comptroller has provided and will provide some responsive information to the requestor. You claim, however, that the remaining requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.103, 552.111, and 552.136 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information, which includes representative sample documents.<sup>1</sup>

Initially, we note that a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 makes certain information public, unless it is expressly confidential under other law. *See* Gov't Code § 552.022(a). One category of public information under section 552.022 is "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]" *Id.*

---

<sup>1</sup> We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

§ 552.022(a)(3). One of the submitted documents, which we have marked, is encompassed by section 552.022(a)(3) and must be released to the requestor, unless it is confidential under other law. Although the comptroller claims that this document is excepted from disclosure pursuant to section 552.103 of the Government Code, we note that this exception to disclosure is a discretionary exception to disclosure under the Public Information Act and, as such, does not constitute "other law" that makes information confidential.<sup>2</sup> Accordingly, we conclude that the comptroller may not withhold any portion of this document under section 552.103. However, since the comptroller also claims that this document contains information that is excepted from disclosure pursuant to section 552.136 of the Government Code, we will address that claim.

Section 552.136 provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value;  
or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. Accordingly, the comptroller must withhold the bank account number that we have marked in the document that is subject to section 552.022(a)(3) pursuant to section 552.136 of the Government Code. However, the comptroller must release the remaining portions of this document to the requestor.

---

<sup>2</sup> Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.,* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive statutory predecessor to section 552.111); *see also Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.-Dallas 1999, no pet.) (governmental body may waive section 552.103). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

You claim that the remaining submitted information is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in pertinent part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code, § 552.103(a), (c). The comptroller maintains the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The comptroller must meet both prongs of this test for information to be excepted under section 552.103(a). We note that contested cases conducted under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991).

You indicate, and provide documentation showing, that the submitted information pertains to litigation between the comptroller and the requestor's client that was pending in the form of a contested case under the APA in the comptroller's Administrative Hearings section on the date that the comptroller received this request for information. Based on our review of your representations and the remaining submitted information, we find that the comptroller has adequately demonstrated that litigation was pending on the date of its receipt of the request and that this information is related to that litigation for purposes of section 552.103. Accordingly, we conclude that the comptroller may withhold the remaining submitted information pursuant to section 552.103 of the Government Code.

However, we note that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information

that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a) and may not be withheld from disclosure on that basis. Further, we note that the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).<sup>3</sup>

In summary, with the exception of the bank account number in the document that is subject to section 552.022(a)(3) of the Government Code that must be withheld pursuant to section 552.136 of the Government Code, the comptroller must release the section 552.022(a)(3) document to the requestor. The comptroller may withhold the remaining submitted information pursuant to section 552.103 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

---

<sup>3</sup> Because we base our ruling on sections 552.103 and 552.136 of the Government Code, we need not address your remaining arguments.

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/lmt

Ref: ID# 187155

Enc. Marked documents

c: Ms. Mary Vance  
2001 Bryan St., Suite 1800  
Dallas, Texas 75201  
(w/o enclosures)